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No. 00-373

IN THE

Supreme Court of the United States

COMMANDER OIL CORP.,

Petitioner,

v.

BARLO EQUIPMENT CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

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PRELIMINARY STATEMENT

In this Reply Brief, Petitioner, Commander Oil Corp. ("Commander") will demonstrate that this case presents an issue of critical significance, warranting review by this Court.

I.

REVIEW BY THIS COURT IS WARRANTED IN ORDER TO ACHIEVE CONSISTENCY AMONG THE COURTS REGARDING "OWNER/OPERATOR" LIABILITY UNDER CERCLA

A. Introduction

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") has been praised as one of the most significant Congressional enactments of the 20th Century. Conversely, it has also received much criticism due to its "miasmatic provisions." (Second Circuit Opinion herein, Pet. App., page 7a). In 1998, the Supreme Court in *United States v. BestFoods* ("*BestFoods*") 524 U.S. 51 (1998), was compelled to review CERCLA in the context of "operator" liability, and the Court resolved nationwide confusion by rendering a bright-line test with respect to corporate parents whose subsidiaries "operate" contaminated sites. It is respectfully submitted that a similar clarification is needed today in the context of "owner" liability.

Prior to the Second Circuit's holding in this case, the general consensus among federal courts was that "owner" liability could be imposed upon tenants who had some degree of control over the activities of their subtenants at a site.

See, e.g., Delaney v. Town of Carmel, 55 F. Supp. 2d 237, 258-59 (S.D.N.Y. 1999); *United States v. A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317, 1332-34 (S.D.N.Y. 1992); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1002-03 (D.S.C. 1984), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). The Second Circuit singularly diverged from this consensus in holding that a tenant/sublandlord, "whose control over the Site was complete" (*See*, District Court Opinion herein, Pet. App., page 56a), is not liable as an "owner" under the statute. Rather than adding clarity and precision to the statute, the Second Circuit's divergence has expanded the "miasmatic" confusion surrounding the implementation of CERCLA.

Furthermore, review by this Court is required to effectuate the statute's remedial purpose. Since its enactment, CERCLA's provisions have been liberally construed in order to assure that liability attaches to all persons potentially responsible for environmental contamination. If the Second Circuit's decision remains the controlling authority on this issue, an entire subset of potentially responsible parties will be exempt from the statute's provisions. The Second Circuit's decision shields tenants, cloaked in the guise of ownership and reaping the monetary benefits thereof, from any liability for environmental contamination occurring on their watch.

B. Judicial Guidance is Needed among Federal Courts to Ensure a Consistent Test for "Owner" Liability under CERCLA.

In rejecting other federal courts' determinations that "owner" liability could be imposed on persons possessing the requisite degree of control over a facility, the Second

Circuit reasoned that imposing "owner" liability on such parties would "conflate two statutorily distinct categories of potentially responsible parties." (Second Circuit Opinion, Pet. App., page 13a). The confusion lies, not in the clear language of the statute, but rather in the Second Circuit's application of it.

The terms "owner" and "operator" are not defined as "statutorily distinct categories." On the contrary, the term "owner or operator" is defined as a unit, as follows:

> (i) in the case of a vessel, any person owing, operating, or charting by demise, such vessel, (ii) in the case of a onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment or similar means to a unit of state or local government, any person who owned, operated, or otherwise *controlled* activities at such facility immediately before hand. Such term does not include a person, who, without participating in the management of a vessel or facility holds indicia of ownership primarily to protect his security interest in the vessel or facility. 42 U.S.C. § 9601 *et seq*. (emphasis added).

As evidenced by the statute, the term "owner or operator" is not only defined as a unit, but it also expressly implicates *control* in determining whether a person is an "owner or operator" for the purposes of the statute. 42 U.S.C. § 9601(iii) (defining "owner or operator" in the case of any facility, conveyed through bankruptcy, as "any person who owned,

operated, or otherwise *controlled* activities at such facility . . ."). Thus, the Second Circuit's rejection of site *control* as a basis for "owner" liability under CERCLA is not only inconsistent with the *BestFoods* analysis, but is, more importantly, inconsistent with the express terms of the statute.

Prior to the Second Circuit's determination, the majority of federal courts which had addressed the issue, correctly found that the requisite degree of control over a facility is not strictly limited to consideration of "operator" liability, but is similarly applicable in the context of "owner" liability. *See, e.g., A&N Cleaners and Launderers, Inc.*, 788 F. Supp. at 1332-33; *Nurad v. William E. Hooper & Sons, Co.*, 966 F.2d 837 (4th Cir. 1992); *South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. at 1003 (D.S.C. 1985), *aff'd sub nom. in part, vacated in part, United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). The requisite degree of Barlo's control herein, sufficient to impose "owner" liability, was established following eight years of litigation, including a four-day bench trial.

At trial, Judge Mishler noted that

> the undisputed facts established that Barlo held itself to be the landlord of the site, had *control* over the use of the land made subject of the lease, and enjoyed the benefits of ownership and control of the site for the full term of Pasley's subtenancy. Pasley looked to Barlo as its landlord, at one point requesting permission from Barlo to build the berm concrete storage area. Aside from two restrictions contained in the Barlo lease, one in which Barlo agreed not to rent any portion of the

> premises to anyone having "any connection with the fuel, fuel oil, or oil business", and a second which "preserved Commander's right to a certain portion of the site containing three oil storage tanks," Barlo's control over the site was *complete*. Neither of these restrictions mitigated Barlo's authority and control over the site as a lessee/ sublessor. Commander has therefore made out a *prima facie* case of CERCLA liability, and Barlo is liable for costs incurred as a result of the contamination of the site.

(District Court Opinion, Pet. App., page 55a-56a).

Based on these facts Judge Mishler concluded that: (a) Barlo had the right and the duty to control any contaminating activities of its subtenant Pasley; and (b) neglected that duty and allowed the contamination to take place under its very nose without the kind of intervention that the law expects from the owner of the property.

Without a finding that Judge Mishler's factual determination was clearly erroneous, the Second Circuit nevertheless reversed, on the law, vitiating any duty on the part of tenants/sublandlords, standing in the shoes of an owner, to prevent or respond to environmental contamination at a facility. It thus becomes necessary for this court to set forth an appropriate test, as it did in *BestFoods*, to assure that tenants/sublandlords such as Barlo, possessing actual control over their subtenants' sites, are appropriately labeled potentially responsible parties under the statute.

C. Supreme Court Review of this Issue is Necessary to Fill Gaps Created by the Second Circuit's Determination which Essentially Exempts Tenants/ Sublandlords from CERCLA's Provisions.

It is well settled that CERCLA should be liberally construed in order to effectuate its remedial purpose. (Second Circuit Opinion, Pet. App., page 9a). Instead of applying a liberal construction, the Second Circuit asserted that the strict liability concept of CERCLA should be a "narrowly tailored tool capturing a specific kind of responsibility." (Second Circuit Opinion, Pet. App., page 15a). Regardless, requiring a tenant to assume responsibility for environmental contamination of a sublessee requires neither a liberal nor narrow construction of CERCLA's liability scheme. All that is required is consistent application of the term "owner and operator" as defined by the statute, and a finding that the test set forth in *BestFoods* is similarly applicable to tenants who, although not fee owners of property, have the requisite degree of control over a facility.

The Second Circuit's determination exempts from liability tenants/sublandlords who permit contamination to take place under their very noses. Just as an executor is liable to an estate for damages incurred for failure to take action while a co-executor wastes a testator's assets, a tenant similarly should not be permitted to avoid liability when it stands in the shoes of an owner and possesses a significant degree of responsibility over a site. To hold otherwise permits tenants/sublandlords to ignore the activities of their subtenants and avoid liability under the statute. Such a result could never have been intended by the statute.

In *BestFoods*, the Supreme Court set forth a uniform rule for finding parent corporations liable under the statute by imposing an "actual control" test with regard to the subject facility. Here, the relationship between tenant/sublandord and subtenant is much more intertwined. We are not asking the federal courts to expand the provisions of the statute but rather to clarify that the actual control test set forth in *BestFoods* is applicable to "owners" as well.

In finding that Barlo did not posses the "bundle of rights that comes with ownership of property" (without finding the lower court's opposite determination to be clearly erroneous), the Second Circuit noted its reluctance to surprise Barlo and other tenants with new and unexpected liability. The only element of surprise is that which emerged from the Second Circuit's determination in contravention of the majority of federal courts which have addressed the issue. *See, e.g., United States v. A&N Cleaners and Launders, Inc.*, 788 F. Supp. 1317, 1332-33 (S.D.N.Y. 1992); *Nurad v. William E. Hooper & Sons, Co.*, 966 F.2d 837 (4th Cir. 1992); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1985), *aff'd sub. nom. in part, vacated in part, United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). The general consensus established by the majority of federal courts regarding the issue already had placed tenants on notice of their potential for environmental contamination at a site.

It thus is necessary for this Court to clarify whether tenants should, or should not, be concerned about their potential liability for environmental contamination on site. We respectfully submit that the former must be true in order to effectuate CERCLA's broad remedial purpose.

D. The Statute's Remedial Purpose is Effectively Carried Out by Assimilating Tenants and Prospective Buyers Rather Than Distinguishing Them.

In reaching its determination, the Second Circuit also opined that a buyer and future owner in fee of the property would be more likely to evaluate the environmental condition of a facility before going ahead with a transaction. Even if this assumption were true (and there is no basis for it), the statute's purpose in alerting prospective buyers to environmental issues on the property is to prevent owners from asserting an ignorance defense in CERCLA proceedings. It follows that tenants who retain a certain level of control over the property should have the same concerns as a fee owner in the property in order to prevent contamination at a site.

Thus, a tenant should not be distinguished from a potential buyer. Rather, a similarity should be drawn between the two wherein a similar onus is placed on tenants/ sublandlords requiring them to be concerned about contamination — not to ignore it while reaping monetary benefits through unencumbered use of contaminated property.

CONCLUSION

The attention of this Court is necessary to clarify the appropriate test for "owner" liability under CERCLA and to ensure that its remedial purpose remains unencumbered. CERCLA's statutory text makes it clear that "owners or operators," as defined, are to be treated similarly: not as two "statutorily distinct categories of potentially responsible parties." It follows from *BestFoods* that "actual control" over

a site should dictate "owner or operator" liability. The Second Circuit's refusal to consider "actual control" in establishing "owner or operator" liability contradicts this Court's holding in *BestFoods* and ignores the plain language of the statute.

The Second Circuit's determination confuses an issue which was previously clarified by the majority of federal courts, thus making it impossible for tenants possessing a certain degree of control over a facility to establish whether they will, or will not, be liable for ignoring contamination on site. We again submit that the former must be true in order to maintain consistency throughout the judiciary and to effectuate the statute's broad remedial purpose. To hold otherwise, permits an entire subset of potentially responsible parties to profit from environmental ignorance and stunts CERCLA's broad remedial purpose.

For all the above reasons, it is respectfully requested that this Court grant Commander's Petition for Writ of Certiorari.

Respectfully submitted,

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